A

LIM ENG CHUAN SDN BHD

v.

UNITED MALAYAN BANKING CORPORATION & ANOR

B

FEDERAL COURT, PUTRAJAYA
HASHIM YUSOFF FCJ
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
SULONG MATJERAIE FCJ
C JEFFREY TAN FCJ
[CIVIL APPLICATION NO: 02(f)-78-12-2011(B)]
18 JANUARY 2013

D ***AGENCY:*** *Power of Attorney - Capacity - Whether company could grant a power of attorney for valuable consideration and expressed to be irrevocable - Powers of Attorney Act 1949, s. 3(1)(a), s. 6(1)(a), First Schedule Form II - Companies Act 1965, s. 35(6)*

E ***AGENCY:*** *Power of Attorney - Validity - Irrevocable power of attorney given by company for valuable consideration - Whether may survive and remain valid upon winding up of donor company - Powers of Attorney Act 1949, s. 6(1)(a)*

F ***COMPANY LAW:*** *Receivership - Winding up, effect of - Secured creditor's rights to dispose property - Irrevocable power of attorney granted by company to bank to deal with property - Whether company competent to create irrevocable power of attorney in favour of creditor - Whether power of attorney survived winding up - Powers of Attorney Act 1949, ss. 3, 6, First Sch*

G ***COMPANY LAW:*** *Winding up - Disposition of property - Property of company charged to bank under National Land Code - Bank conferred power to sell property through irrevocable power of attorney in debenture - Property sold by bank after company wound up by third party - Whether sale by bank void - Whether sale subject to s. 223 of Companies Act 1965*
H *- Whether bank merely exercising right to security - Whether bank obliged to deliver property to company - Whether irrevocable power of attorney in favour of bank nullified by winding up order - Companies Act 1965, ss. 223, 300(1)(b)(ii), 305(1) - Powers of Attorney Act 1949, ss. 3, 6*

I ***COMPANY LAW:*** *Winding up - Disposition of property - Scope and effect of s. 223 of Companies Act 1965 - Whether s. 223 applies to disposal of assets charged as security - Whether realisation by secured creditor of assets of company charged as security falls within s. 223*

LAND LAW: *Charge - Sale of land - Land charged to chargor under provisions of National Land Code - Land subject to power of sale conferred by irrevocable power of attorney in debenture in favour of chargor - Whether chargor obliged to comply with provisions for judicial sale under National Land Code - Whether provisions of Pt 16 Ch 3 of National Land Code applicable - Whether Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors distinguished - National Land Code, Part 16, Ch 3*

LAND LAW: *Power of Attorney - Validity, of - Whether a company can grant a power of attorney for valuable consideration and expressed to be irrevocable - Whether irrevocable power of attorney granted by company may survive and remain valid upon winding up of donor company - Powers of Attorney Act 1949 s. 3(1)(a), s. 6(1)(a), First Schedule Form II - Companies Act 1965 s. 35(6)*

LAND LAW: *Sale of land - Validity - Sale of company's land by bank acting under irrevocable power of attorney in debenture - Land charged to bank under provisions of National Land Code - Whether bank could sell land without resorting to procedure under National Land Code - Whether provisions of Pt 16 Ch 3 of National Land Code applicable - Whether Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors distinguished - National Land Code, Part 16, Ch 3*

The first respondent granted an overdraft facility to the appellant on 16 September 1983 ('the facility'). The facility was secured by a debenture ('debenture') dated 10 March 1984 which included a fixed charge over seven pieces of land ('the lands') and a charge under the National Land Code ('NLC') over the lands. The debenture contained a power of attorney ('the PA') in favour of the first respondent for valuable consideration. The said PA was expressed to be irrevocable. On 24 July 1987 the facility went into default and the first respondent demanded repayment. However, on the application of one Automotive Corp Sdn Bhd ('ACSB'), the appellant was ordered to be wound up on 29 September 1994. On 16 May 1995, the first respondent gave notice to the appellant that it would exercise its power to sell the lands pursuant to the debenture. The first respondent then appointed a receiver and manager ('R & M') under the debenture. Subsequently, on 24 October 1995, the first respondent as attorney of the appellant pursuant to the PA entered into a sale and purchase agreement with the second respondent for the sale of the lands ('SPA'). However, the appellant managed to pay the monies owed to ACSB and on 4 November 1996 obtained a stay of the

winding-up order. The appellant then filed this suit to set aside the sale of the lands by the first respondent to the second respondent. The High Court dismissed the application and the Court of Appeal upheld the dismissal. The appellant was granted leave to appeal to the Federal Court on the following questions: (i) Question 1 – Whether, when a chargee sells charged property to realise its loan without recourse to and compliance with the NLC and without the consent of the chargor, the sale void as stated in *Kimlin Development Sdn Bhd v. Bank Bumiputra Malaysia Berhad ('Kimlin')* irrespective of whether the sale was by use of a PA as opposed to a debenture; (ii) Question 2 – Whether a PA for valuable consideration and expressed to be irrevocable, could be granted by a company as donor (as opposed to a natural person) pursuant to s. 6(1)(a) of the Powers of Attorney Act 1949 ('the Act'); (iii) Question 3 – In respect of a PA expressed to be for valuable consideration and irrevocable pursuant to s. 6(1)(a) of the Act, whether such a PA survived and remained valid upon the winding up of a donor company; and (iv) Question 4 – Whether a disposition of property belonging to a company in liquidation which is held as a security or otherwise, without leave of the winding up court required by s. 223 of the Companies Act 1965 ('CA65') void?

Held (dismissing appeal with costs)
Per Zainun Ali FCJ delivering the judgment of the court:

(1) *Kimlin* is no authority for the proposition that a chargee of land which is charged both under the NLC and also under a debenture cannot exercise its right of sale pursuant to an irrevocable PA given for valuable consideration under the debenture to sell the land. *Kimlin* was not applicable to the present appeal since *Kimlin* was concerned with the narrow issue of whether a R&M appointed under a debenture can sell lands charged under the NLC, unlike the position in this appeal where the first respondent sold the lands pursuant to an irrevocable PA that was given as security. Hence, the answer to question 1 was that a sale by a chargor through its attorney, pursuant to an irrevocable PA given for valuable consideration, of lands charged under the NLC is valid. (paras 37, 38 & 39)

(2) A company can grant a PA in view of the construction of s. 3(1)(a) of the Act and s. 35(6) of the CA65. Form II in the First Schedule to the Act is the appropriate form referred to in s. 3(1)(a). This Form sets out the Form of authentication in the case of a PA executed by a company or corporation. Thus when both s. 3(1)(a) and Form II are read and construed simultaneously, it is clear that a company is competent to create a PA, provided there is scrupulous compliance with the form of authentication, as had been done in the PA herein. Hence, the answer to question 2 was that a PA could be granted by a company as donor. (paras 59, 60, 61, 62 & 63)

(3) In relation to question 3, the winding-up order made against the appellant at the instance of ACSB did not vitiate, nullify or revoke the PA which the appellant had expressly granted to the first respondent in the debenture. The appellant was only in winding up at the time the SPA was entered into. It was not dissolved nor had it ever been. Dissolution of a company only occurs when an order is made to dissolve the company under ss. 239 and 240 of CA65. In any event, a permanent stay of the winding up proceedings under s. 243 of CA65 was obtained by the appellant, which resulted in a total discontinuance of and termination of the winding up proceedings. (paras 65, 66, 67, 68 & 69)

(4) Section 6(1)(a) of the Act protects a purchaser who purchases property from a donee of a PA expressed to be irrevocable and given for valuable consideration. The clear language of s. 6(1)(a) is unequivocal in its stand as to instances when a PA cannot be revoked. Thus, a PA survives and remains valid upon the winding up of a donor company. (para 74)

(5) In relation to question 4, s. 223 of CA65 does not apply to disposal of assets charged as security. The lands being subject to a charge under the debenture, meant that the sale of the lands was not a disposition under s. 223 of CA65. Section 223 was inapplicable in the instant appeal since the first respondent was exercising its right under a security when it sold the lands. The realisation by a secured creditor of assets of a company charged as security does not fall within s. 223 of CA65. (paras 78, 81-92)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden pertama telah memberikan satu kemudahan overdraf kepada perayu pada 16 September 1983 ('kemudahan tersebut'). Kemudahan tersebut dijamin oleh satu debentur ('debentur') B bertarikh 10 Mac 1984 yang termasuk gadaian tetap ke atas tujuh bidang tanah ('tanah tersebut') dan satu gadaian di bawah Kanun Tanah Negara ('KTN') terhadap tanah tersebut. Debentur tersebut mengandungi surat kuasa wakil ('PA') memihak kepada responden pertama untuk balasan yang bernilai. PA tersebut C dinyatakan tidak boleh batal. Pada 24 Julai 1987 kemudahan tersebut dimungkiri dan responden pertama menuntut bayaran semula. Walau bagaimanapun, atas permohonan Automative Corp Sdn Bhd ('ACSB'), perayu diperintahkan untuk digulungkan pada 29 September 1994. Pada 16 Mei 1995, responden pertama D memberikan notis kepada perayu bahawa ia akan melaksanakan kuasanya untuk menjual tanah tersebut berikutan debentur tersebut. Responden pertama kemudian melantik penerima dan pengurus ('R&M') di bawah debentur tersebut. Kemudian, pada 24 Oktober 1995, responden pertama sebagai wakil perayu E menurut PA memasuki perjanjian jual beli dengan responden kedua untuk penjualan tanah tersebut ('PJB'). Walau bagaimanapun, perayu berjaya membayar wang yang dihutang kepada ACSB dan pada 4 November 1996 memperolehi penggantungan perintah penggulungan tersebut. Perayu kemudian memfailkan guaman ini F untuk mengenepikan jualan tanah tersebut oleh responden pertama kepada responden kedua. Mahkamah Tinggi menolak permohonan tersebut dan Mahkamah Rayuan mengekalkan penolakan tersebut. Perayu diberikan kebenaran untuk merayu ke Mahkamah Persekutuan atas soalan-soalan berikut: (i) Soalan 1 – Sama ada, G apabila pemegang gadaian menggadai harta untuk merealisasikan hutangnya tanpa bantuan dan pematuhan terhadap KTN dan tanpa persetujuan penggadai, jualan tersebut batal seperti yang dinyatakan dalam kes *Kimlin Development Sdn Bhd v. Bank Bumiputra Malaysia Berhad ('Kimlin')* tanpa mengira sama ada H jualan tersebut adalah dengan menggunakan PA dan bukannya debentur; (ii) Soalan 2 – Sama ada PA untuk balasan yang bernilai dan dinyatakan sebagai tidak boleh batal, boleh diberikan oleh syarikat sebagai penderma (bertentangan dengan orang biasa) berikutan s. 6(1)(a) Akta Surat Kuasa Wakil 1949 ('Akta'); (iii) I Soalan 3 – Berkaitan dengan PA dinyatakan adalah untuk balasan yang bernilai dan tidak boleh batal berikutan s. 6(1)(a) Akta, sama

ada PA tersebut bertahan dan tetap kekal selepas penggulungan syarikat penderma; dan (iv) Soalan 4 – Sama ada pelupusan harta kepunyaan syarikat dalam penggulungan yang dipegang sebagai jaminan atau sebaliknya, tanpa kebenaran mahkamah penggulungan seperti yang diperlukan oleh s. 223 Akta Syarikat 1965 ('AS65'), batal?

Diputuskan (menolak rayuan dengan kos)
Oleh Zainun Ali menyampaikan penghakiman mahkamah:

(1) *Kimlin* bukan otoriti bagi usul bahawa pemegang gadaian tanah yang digadaikan di bawah KTN dan juga di bawah debentur tidak boleh melaksanakan kuasanya menurut PA yang tidak boleh batal yang diberikan bagi balasan bernilai di bawah debentur untuk menjual tanah tersebut. *Kimlin* tidak terpakai kepada kes ini kerana *Kimlin* adalah berkaitan dengan isu terhad sama ada R&M yang dilantik di bawah debentur boleh menjual tanah tersebut yang digadaikan di bawah KTN, dan bukan seperti kedudukan rayuan ini di mana responden pertama menjual tanah tersebut berikutan PA yang tidak boleh batal yang diberikan sebagai jaminan. Oleh demikian, jawapan kepada soalan 1 adalah bahawa sesuatu jualan oleh penggadai melalui wakilnya, menurut PA yang tidak boleh batal yang diberikan bagi balasan bernilai, untuk tanah yang digadai di bawah KTN adalah sah.

(2) Sesebuah syarikat boleh memberikan PA berikutan pentafsiran s. 3(1)(a) Akta dan s. 35(6) AS65. Borang II dalam Jadual Pertama Akta adalah borang yang wajar yang dirujuk dalam s. 3(1)(a). Borang ini mengemukakan bentuk pengesahan dalam kes PA yang dilaksanakan oleh sesebuah syarikat atau perbadanan. Oleh itu, apabila kedua-dua s. 3(1)(a) dan Borang II dibaca dan ditafsir bersama, adalah jelas bahawa sesebuah syarikat adalah kompeten untuk membentuk sesuatu PA, jika terdapat pematuhan teliti borang untuk pengesahan, seperti yang telah dilakukan dalam PA di sini. Oleh itu, jawapan kepada soalan 2 adalah, PA boleh diberikan oleh syarikat sebagai penderma.

(3) Berkaitan dengan soalan 3, perintah penggulungan yang dibuat terhadap perayu dalam perkara ACSB tidak membatalkan, menyangkal atau menarik balik PA yang perayu telah dengan jelas berikan kepada responden pertama dalam debentur. Perayu digulungkan hanya pada masa PJB dimasuki. Ia tidak

dan tidak pernah dibubarkan. Pembubaran sesebuah syarikat berlaku hanya apabila suatu perintah dibuat untuk membubarkan syarikat tersebut di bawah ss. 239 dan 240 AS65. Walau apapun, penggantungan kekal prosiding penggulungan di bawah s. 243 AS65 telah diperolehi oleh perayu, yang mengakibatkan pemberhentian dan penamatan keseluruhan prosiding penggulungan.

(4) Seksyen 6(1)(a) Akta tersebut melindungi seseorang pembeli yang membeli harta daripada penerima derma PA yang dinyatakan tidak boleh batal dan diberikan bagi balasan bernilai. Peruntukan s. 6(1)(a) adalah jelas dalam peruntukannya dalam keadaan apabila PA tidak boleh batal. Oleh demikian PA kekal dan tetap sah selepas penggulungan syarikat penderma.

(5) Berkaitan dengan soalan 4. s. 223 AS65 tidak beraplikasi kepada pelupusan aset yang digadai sebagai jaminan. Tanah tersebut yang tertakluk kepada gadaian di bawah debentur, bermaksud bahawa jualan tanah tersebut bukan pelupusan di bawah s. 223 AS65. Seksyen 223 tidak terpakai dalam rayuan ini kerana responden pertama menguatkuasakan haknya di bawah jaminan apabila ia menjual tanah tersebut. Realisasi oleh pemiutang aset syarikat yang digadai sebagai jaminan tidak terangkum dalam s. 223 AS65.

Case(s) referred to:

Attorney General v. Lamplough [1878] 3 Ex D 214 ***(refd)***

Bank Bumiputra Malaysia Bhd & Ors v. Kimlin Housing Development Sdn Bhd (in receivership) [1993] 1 LNS 88 HC ***(refd)***

K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(foll)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(dist)***

Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC ***(refd)***

Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2000] 3 CLJ 127 CA ***(refd)***

Re French (Wine Bar) Ltd [1987] BCLC 499 ***(refd)***

Re Margart Pty Ltd (in liq) Hamilton v. Westpac Banking Corp & Anor [1984] 2 ACLC 709 ***(refd)***

Re MW Lee & Sons Enterprise Ltd [1999] 2 HKL 698 ***(refd)***

Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1997] 2 CLJ 775 CA ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & 3 Ors [1995] 2 CLJ 392 CA ***(refd)***
Watson v. King 171 ER 87 ***(refd)***
Wellington Steam Ferry Company (Limited) (in liquidation) and Another v. The Wellington Deposit, Mortgage and Building Association (Limited) [1915] 34 NZLR 913 ***(foll)***
Wily & Anor v Commonwealth of Australia [1996] 19 ACSK 720 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 35(6), 223, 239, 240
Courts of Judicature Act 1964, s. 96
Power of Attorney Act 1949, ss. 3(1)(a), 6(1)(a)

For the appellant - Bastian Vendargon (Gene Anand Vendargon with him); M/s YS Woo & Proctor
For the 1st respondent - Lambert Rasa-Ratnam (Andrew Chiew with him); M/s Lee Hishammuddin Allen & Gledhill
For the 2nd respondent - SS Muker (Samreet Singh with him); M/s Lovelace & Hastings

[Editor's note: For the Court of Appeal judgment, please see Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor [2010] 9 CLJ 637.]

Reported by Amutha Suppayah

JUDGMENT

Zainun Ali FCJ:

[1] This court was invited in this appeal to answer four questions in which leave against the decision of the Court of Appeal was granted to the appellant on 27 August 2010.

[2] The issues raised elicited varying response in the courts below. The High Court decision was affirmed by a majority in the Court of Appeal.

Brief Facts

[3] The first respondent granted an overdraft facility of RM1.5 million to the borrower (appellant) on 16 September 1983 ("the facility").

[4] It is important to note that the said facility was secured by a debenture ("debenture") dated 10 March 1984 which included a fixed charge over seven pieces of land ("the lands") and a charge under the National Land Code over the lands, created by the first respondent ("charge").

[5] The debenture contains a power of attorney ("the PA") in section 6.06, in favour of the first respondent for valuable consideration. The said PA is one which is expressed to be irrevocable.

[6] On 24 July 1987, the facility went into default. The first respondent then demanded repayment of the facility.

[7] Following this, on the application of one Automotive Corp Sdn Bhd, the appellant was ordered to be wound up on 29 September 1994.

[8] On 16 May 1995, the first respondent gave notice to the appellant that it would exercise its power to sell the land, pursuant to section 6.05 of the debenture.

[9] As a prelude, the first respondent exercised its rights under section 6.02(a) of the debenture by appointing a receiver and manager, who issued an advertisement on 11 July 1995 to sell the land.

[10] About a week later, ie, on 17 July 1995, the directors of the appellant filed an action at the Shah Alam High Court, for an originating summons ("the action"), to declare the sale of the land null and void.

[11] The High Court dismissed the action on 29 May 1996. The directors' appeal against the dismissal of the action was heard by the Court of Appeal. It was also dismissed.

[12] Thereafter, on 24 October 1995, the first respondent as attorney of the appellant (pursuant to the abovementioned irrevocable power of attorney granted by the appellant under section 6.06 of the debenture) entered into a sale and purchase agreement with the second respondent for the sale of the land ("SPA").

[13] However the appellant managed to pay the monies owed to Automotive Corporation Sdn Bhd and thus on 4 November 1996, the appellant obtained a stay of the winding-up order of 29 September 1994.

[14] The appellant then filed this originating summons on 13 May 1997, to set aside the sale of the land by the first respondent to the second respondent.

[15] The learned High Court Judge heard and dismissed the originating summons on 3 January 2005. The appellant then filed an appeal on 2 February 2005 to the Court of Appeal and after having heard the appeal, it was dismissed by majority.

[16] All three judges of the Court of Appeal furnished separate written grounds for their decision in which one was a minority view.

[17] The application for leave was granted on 27 August 2010, we were invited to answer the following four questions:

(a) Question 1

When a chargee sells charged property to realise its loan, without recourse to and compliance with the National Land Code 1965 (NLC), and without the consent of the chargor, is that sale void, as stated in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805 SC irrespective of whether the sale was by use of a power of attorney (PA) as opposed to a debenture?

(b) Question 2

Can a PA for valuable consideration and expressed to be irrevocable, be granted by a company as donor (as opposed to a natural person) pursuant to s. 6(1)(a) PA Act 1949?

(c) Question 3

In respect of a power of attorney (PA), expressed to be for valuable consideration and irrevocable pursuant to s. 6(1)(a) of the PA Act 1949, does such a PA survive and remain valid upon the winding up of a donor company?

(d) Question 4

Is a disposition of property belonging to a company in liquidation which is held as a security or otherwise, without leave of the winding up court required by s. 223, Companies Act 1965 void?

The Court's View

[18] We shall answer the questions posed in the order they are stated.

Question 1

[19] To answer this question, it would be instructive to understand what was the ratio in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805 ("*Kimlin*").

[20] In *Kimlin*, the issue was whether a receiver and manager appointed under a debenture can sell lands charged under the National Land Code.

[21] It is commonplace that a creditor is entitled to pursue all remedies available to him in law and in equity for the purpose of recovering monies due to him. The creditor can exercise this at any time whether contemporaneously or simultaneously or successively. He can also choose not to pursue it at all.

[22] In *Kimlin*, the borrower company ("the appellant") was the registered proprietor of certain lands ("the land"). The appellant executed two legal charges ("the charges") under the NLC over the lands in favour of Bank Bumiputra (M) Bhd ("the first respondent") with a view to securing banking facilities granted to the appellant. Thereafter the appellant executed a debenture in favour of the first respondent to secure various banking facilities ("the debenture") in which the appellant created both a fixed and a floating charge. One of the provisions of the debenture was for the appointment of a receiver and manager ("R & M") who have certain powers.

[23] Subsequently events occurred upon which the powers to appoint the R & M under the debenture became exercisable. Pursuant to such powers, the bank duly appointed the second,

third and fourth respondents as the R & M of the appellant. The R & M applied to the High Court by way of originating summons for leave to sell the lands ("the application"), since under the debenture appointing them (the R & M) there was no express provisions appointing the R & M as attorneys of the appellant; thus in its bid to sell the land without resorting to proceedings under the NLC to obtain a judicial sale, the R & M made the application for leave to sell the land to the High Court, by way of originating summons.

[24] However the appellant then went into liquidation and the application by the R & M was opposed by the liquidator.

[25] In the High Court (see *Bank Bumiputra Malaysia Bhd & Ors v. Kimlin Housing Development Sdn Bhd (in receivership)* (*supra*) [1993] 1 LNS 88; [1993] 2 MLJ 126) the learned judge held that:

(i) the R & M were entitled to sell the lands which were subject to the charges without taking proceedings under the NLC to obtain a judicial sale;

(ii) the fact that a company has been put into liquidation does not affect the securities held by the R & M, at least not until the secured creditors have been fully paid off.

[26] The secured creditors could therefore dispose of the securities despite the liquidation. The trial judge went on to say that the R & M were entitled to do what the debenture provided for.

[27] The aggrieved liquidator then appealed against the said High Court decision. The judgment of the (then) Supreme Court at p. 823A reads as follows:

> ... no power of sale can be conferred by way of a debenture or power of attorney or **otherwise**, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred as a chargee himself omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owners. (emphasis added)

[28] Since the questions posed in *Kimlin* concerned only the R & M, the above passage is *ratio decidendi* only as regards the power of sale which was exercised by the R & M appointed under a debenture.

[29] In the Court of Appeal, the majority comprising Low Hop Bing JCA and Zaharah Ibrahim JCA held that *Kimlin* did not apply.

[30] We agree with the majority in the Court of Appeal that the other part of the judgment in *Kimlin* which referred to "power of attorney or otherwise" and "power of attorney" is at best, only *obiter dictum, albeit* when the questions posed there concerned only the R & M, since the debenture there did not contain a PA clause.

[31] Thus in *Kimlin*, the decision has nothing to do with an attorney appointed pursuant to a PA clause in the debenture, as is apparent in this appeal.

[32] It would also be instructive to note that *Kimlin* was referred *in extenso* in *K Balasubramaniam (Likuidator Bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793; [2005] 1 AMR 585 FC.

[33] Firstly the Federal Court in *K Balasubramaniam* speaking through Siti Norma Yaakob then FCJ, held that:

(i) *Kimlin* was decided on its peculiar facts;

(ii) the issue of law raised in *Kimlin* was whether a R & M appointed under a debenture can proceed to sell the charged land by just obtaining the leave of the court without taking any proceedings under the Code;

(iii) the subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale.

[34] That was the decision in *K Balasubramaniam* (*supra*). Meanwhile the Court of Appeal in the instant appeal concluded that:

> ... It is therefore my considered opinion that the principles of *Kimlin* should be restricted in scope and limited to the powers of the receiver and manager appointed under a power contained in an instrument to dispose of lands charged under the Code.

[35] It is our view that *Kimlin* has limited scope and is at once distinguishable on the facts. A

[36] In the light of the above, we agree with learned counsel for the first respondent that the question as formulated is confusing, because it postulates a situation that a chargee of land which is charged both under the National Land Code and also under a debenture, cannot, on the authority of *Kimlin*, exercise its right of sale, pursuant to an irrevocable power of attorney given for valuable consideration, under the debenture to sell the land. B

[37] As can be seen, *Kimlin* is no authority for the above proposition and thus this is not the law. C

[38] In *Kimlin*, the facts show that the sale in question was effected by the R & M, as opposed to the facts in this appeal where the sale was done by the first respondent bank as attorney of the appellant borrower, pursuant to the PA; and that in *Kimlin* there was no express provision in the debenture appointing the R & M as attorneys for the borrower while in this appeal, the debenture has an express provision incorporating the PA clause. D E

[39] We find that *Kimlin* is not applicable to the present appeal since *Kimlin* was concerned with the narrow issue of whether a R & M appointed under a debenture can sell lands charged under the NLC, unlike the position in this appeal where the first respondent sold the lands pursuant to an irrevocable power of attorney that was given as security. F

[40] Hishamuddin Yunus JCA in dissenting, observed that the issue was whether the sale was undertaken by the chargee (ie, the 1st respondent) or the chargor (ie, the appellant). If the sale was carried out by the chargor, *Kimlin* does not apply, following the ratio in the Federal Court authority of *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86. His Lordship also found that it was "unrealistic and unfair to regard the sale as a sale undertaken or effected by the chargor" because it was the chargee who was enforcing its security to sell the lands. G H

[41] As was submitted by counsel of the first respondent, Hishamuddin Yunus JCA's dissent is premised on his finding that it was the first respondent who ultimately wanted the land to be sold. I

[42] We find that the dissenting view of Hishamuddin Yunus JCA did not consider the capacity in which the first respondent sold the land and entered into the SPA with the second respondent.

[43] In this connection, the first respondent sold the land and signed the SPA as attorney for the appellant under an irrevocable power of attorney, which in his judgment he had himself held to be a valid power of attorney. Consequentially with respect, it ought to have then been apparent to His Lordship that the sale was carried out by the appellant/chargor and thus *Kimlin* is not applicable.

[44] As is clear in *Kimlin*, because the debenture did not contain an express provision appointing the R & M as attorney of the borrower (the appellant), then any sale by the R & M would be as agent of the chargee, unlike the instant appeal where the first respondent sold the land as attorney of the appellant/chargor pursuant to an irrevocable power of attorney given for valuable consideration.

[45] In view of the above, our answer to question 1 is that a sale by a chargor through its attorney, pursuant to an irrevocable power of attorney given for valuable consideration, of land charged under the National Land Code, is valid.

[46] As regards question 2, this is our view. Since the issue raised did not arise from either the High Court decision and that it was raised for the first time before the Court of Appeal – it can be rephrased in this manner – whether a company can grant a power of attorney.

[47] The Court of Appeal was unanimous in rejecting the appellant's arguments on this issue.

[48] The appellant's argument was that only a natural person and not a company, can grant a power of attorney.

[49] Low Hop Bing JCA held that a company can grant a power of attorney under s. 3(1)(a) of the Power of Attorney Act 1949 ("PA Act"), read with Form II in the First Schedule. Both Zaharah Ibrahim JCA and Hishamuddin Yunus JCA made similar findings.

[50] In view of the above the first respondent took the position that the above question 2 does not arise from a decision of the Court of Appeal and was not an issue decided by the Court of Appeal (s. 96 of the Courts of Judicature Act 1964; *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51.

[51] It is our view that since the issue is related to the other three questions posed, we are minded to answer this question but limiting its scope to what was alluded to above, ie, whether a company can grant a power of attorney.

[52] The said power of attorney is contained in section 6.06 of the debenture dated 10 March 1984 executed under seal and is expressed to be irrevocable, given for valuable consideration.

[53] At the time it was created the Powers of Attorney Ordinance 1949 was in force. It was revised in 1990 and became the Power of Attorney Act 1949. The Ordinance and the Act are identical in all material respect.

[54] To begin with the law relating to powers of attorney is governed by common law – the law of agency and statute.

[55] It is the appellant's submission that the donor of a power of attorney must be a natural person or individual and not a company or corporation.

[56] In our view, inclusive in the issue is whether a company or corporation is competent to create a power of attorney.

[57] In our view, the short answer to this question is – it can, in view of the construction of s. 3(1)(a) of the Powers of Attorney Act 1949 and s. 35(6) of the Companies Act 1965.

[58] Section 3(1)(a) of the PA Act 1949 ("s. (3)(1)(a)") *inter alia* provides that:

> (1) No instrument property to create a power of attorney executed after the commencement of this Act shall have validity to create such power within Peninsular Malaysia unless (a) ... the instrument ... is authenticated in the appropriate form set out in the First Schedule hereto ...

[59] Form II in the First Schedule to the PA Act 1949 is the appropriate Form referred to in s. 3(1)(a). This Form sets out the Form of authentication in the case of a power of attorney executed by a company or corporation.

[60] It might be mentioned here that the inclusion of a schedule(s) to an Act of Parliament is commonplace and that it is now an established legislative drafting practice to do so. This is especially true where specific forms are prescribed for the purpose of carrying into effect the sections set out in the main body of the Act. Thus the schedule is to be read and construed as an integral, essential and operative part of the Act. (See *Attorney General v. Lamplough* [1878] 3 Ex D 214, 229).

[61] Thus when both s. 3(1)(a) and Form II are read and construed simultaneously, it is clear that a company is competent to create a power of attorney, provided of course, there is scrupulous compliance with the form of authentication, as has been done in the PA herein.

[62] Based on the above, the answer to question 2 (as is confined to the issue before the Court of Appeal) is simply that a power of attorney can be granted by a company as donor.

[63] Coming to question 3, ie, in respect of a PA expressed to be for valuable consideration and irrevocable pursuant to s. 6(1)(a) of the PA Act 1949, does such a PA survive and remain valid upon the winding up of a donor company, answer given by the Court of Appeal was unanimous, in that based on s. 6(1)(a) of the PA Act 1949, the prohibition against the revocation of an irrevocable power of attorney was absolute and is not affected by any winding up order.

[64] The Court of Appeal added that in this appeal, the said power of attorney is an authority coupled with interest and is thus irrevocable at common law. The Court of Appeal also found that the decision of the Federal Court in *K Balasubramaniam* (*supra*) has a strong binding effect. The appellant on the contrary contended that *K Balasubramaniam* was wrongly decided.

[65] Our short answer to Q3 is this: that upon a careful perusal of the appeal record and in the light of the authority of *K Balasubramaniam* (*supra*), it is our view that the winding-up order made against the appellant at the instance of Automotive

Corporation Sdn Bhd, does not vitiate, nullify or revoke the PA which the appellant has expressly granted to the first respondent in the debenture.

[66] The Federal Court decision of *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2000] 3 CLJ 127 CA was cited.

[67] In *Melantrans* (*supra*), the debenture also contains a validly constituted power of attorney clause which irrevocably appointed the R & M as lawful attorney of the company. The R & M entered into a sale and purchase agreement to sell a lease on the company's behalf. The High Court granted a declaration that the sale and purchase agreement was valid and binding. The said decision was affirmed by the Court of Appeal and upheld by the Federal Court.

[68] In the instant appeal, it is clear that the sale and purchase agreement (SPA) was entered into by the first respondent with the second respondent after the appellant was wound up but before it was dissolved.

[69] It is also our view that, based on the Australian authority of *Wellington Steam Ferry Company (Limited) (in liquidation) and Another v. The Wellington Deposit, Mortgage and Building Association (Limited)* [1915] 34 NZLR 913, a power of attorney given by a company as security will, if at all, only be revoked upon its dissolution. By way of analogy, a power of attorney given as a security by a natural person is, at common law, revoked when the donor dies (*Watson v. King* 171 ER 87).

[70] Based on the above authorities, we find that the decision of the Federal Court in *K Balasubramaniam* (*supra*) was rightly decided when it held that a power of attorney granted by a company is not revoked upon winding-up of the company.

[71] We agree with the observation made by Stout CJ in *Wellington Steam* (*supra*) when His Lordship states that:

> What can be done is that, if the company were dissolved, a new trustee could be appointed and the legal estate thus transferred to the defendant, but that can now be done by deed. The case of *In re No. 9 Bomoro Road*, shows that. In that case *In re Taylor's Agreement Trusts* was distinguished, and older cases followed. I think also that these cases show that a company must on dissolution be considered as having ceased to exist for any purpose, and in the absence of special statutory provision an attorney cannot be agent of something that does not exist.

[72] As had been stated earlier, the appellant was only in winding up at the time the SPA was entered into. It was not dissolved nor has it ever been. In so far as we are aware, dissolution of a company only occurs when an order is made to dissolve the company under ss. 239 and 240 Companies Act 1965.

[73] In any event, a permanent stay of the winding up proceedings under s. 243 Companies Act 1965 was obtained by the appellant, which resulted in a total discontinuance of and termination of the winding up proceedings. (See *Vijayalakshmi Devi Nadchatiram v. Jegadevan s/o Nadchatiram & 3 Ors* [1995] 2 CLJ 392.

[74] In the light of the above, s. 6(1)(a) PA Act 1949 protects a purchaser who purchased property from a donee of a power of attorney expressed to be irrevocable and given for valuable consideration. In our view the clear language of s. 6(1)(a) "... or by death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, "is unequivocal in its stand as to instances when a power of attorney cannot be revoked.

[75] Thus our answer to question 3 is that a power of attorney survives and remains valid upon the winding up of a donor company.

[76] Coming to the last question in this appeal, ie, question 4, the issue is whether leave of the winding up court is required by s. 223 Companies Act 1965, in the disposition of property belonging to a company in liquidation which is held as a security or otherwise.

[77] The appellant's position is that the sale of the land was contrary to s. 223 Companies Act 1965 since leave of the court is a requisite before the first respondent can sell the land.

[78] In the Court of Appeal, the majority held that:

> Section 223 did not apply.
>
> We find that s. 223 do not apply to disposal of assets charged as security. We do not agree with the appellant that the sale was void under the said section in relation to a sale of charged properties by a R & M.

[79] Zaharah Ibrahim JCA made similar findings as above. A

However Hishamuddin Yunus JCA held otherwise. His Lordship's dissent included the view that s. 223 applies to the sale of any property belonging to the company after the commencement of winding up and hence, leave of court is required. He was of the B view that *Kimlin* applied in this case.

[80] His Lordship added that s. 223 applied because "a sale of a property of a company that has been wound up had taken place without the permission of the winding up court." C

[81] In our view, the land being subject to the charge and a fixed charge under section 3.01 of the debenture, meant that the sale of the land was not a disposition under s. 223, Companies Act 1965. D

[82] For this purpose, one has to look at the underlying rationale of s. 223 Companies Act 1965.

[83] Section 223 Companies Act 1965 provides as follows:

> 223 AVOIDANCE of DISPOSITION of PROPERTY, ETC E
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void. F

[84] From a reading of s. 223 Companies Act, 1965 and the relevant authorities cited, it is our view that s. 223 is inapplicable in the instant appeal since the first respondent was in this case, exercising its right under a security when it sold the land. G

[85] Our view is fortified by the decision of the Supreme Court of New South Wales in *Re Margart Pty Ltd (in liq) Hamilton v. Westpac Banking Corp & Anor* [1984] 2 ACLC 709 at pp. 710, 711 & 712-714 where Helsham CJ considered s. 368 (which is similar to our s. 223), in particular the phrase "any disposition of the property of the company, where he held that s. 368 has no application to assets that are not free assets of the company which the company is beneficially entitled to and which can be realised for the benefit of its creditors. In other words, *s. 368 as* H I

is s. 223 of our Companies Act, is not intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when the creditor is entitled to have them. (emphasis added)

[86] The following passage of Helsham CJ's judgment is particularly relevant:

> ... What lies behind the section is the prevention of the improper alienation and disposition of the company's property. I do not believe it was intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them.
>
> To hold otherwise would mean that assets covered by a fixed charge, or their momentary equivalent, could not with impunity be taken by or paid to the person having the benefit of the charge at any time after the commencement of the winding up.
>
> Anything done by the company or in receiver to pay the charge or transfer assets to the charge would be void. No bank or other person holding in charge under which moneys had become payable could take payment without the precaution of obtaining what is known as a validating order. I do not believe that s. 368 was intended to operate in that way.

[87] *Re Margart* (*supra*) has been considered and followed both in Malaysia and in other parts of the Commonwealth. (See *Re French (Wine Bar) Ltd* [1987] BCLC 499 (UK), *Re MW Lee & Sons Enterprise Ltd* [1999] 2 HKL 698 (Hong Kong), *Wily & Anor v. Commonwealth of Australia* [1996] 19 ACSK 720 and *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1997] 2 CLJ 775.

[88] It is clear from the above that the sale of the land by the first respondent to the second respondent is not a disposition within the meaning of s. 223 Companies Act 1965.

[89] In fact even the minority judgment in the Court of Appeal (Hishamuddin Yunus JCA) conceded that if an application for leave was sought under s. 223, His Lordship would have allowed it.

[90] This in itself is indicative of the learned judge's recognition that s. 223 Companies Act was not intended to prohibit disposition of secured assets.

[91] In view of the above, we would answer question 4 by holding that the realisation by a secured creditor of assets of a company charged as security does not fall within s. 223 Companies Act 1965.

[92] Thus our unanimous decision is that – we would answer the four questions posed in favour of the first and second respondent. As a consequence we find the sale of the land by the first respondent to the second respondent to be valid.

[93] We therefore dismiss this appeal with costs.

Deposit to be refunded.